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Tahkim: Why We Should Create an American Muslim Arbitration Tribunal

Talha Muhammad*

This Note navigates the complex relationship between the U.S. legal system and Islamic law, particularly focusing on the challenges faced by U.S. courts. Examining judicial struggles in applying Islamic law, it critiques the limitations of expert witnesses and proposals for reform by legal scholars. Three prominent proposals—Peter W. Beauchamp's hands-off approach, Eun-Jung Katherine Kim's tiered system, and Eugene Volokh's endorsement of existing legal provisions—are analyzed in their efficacy in incorporating Islamic law into U.S. legal proceedings. The Note provides an alternative: the establishment of a Muslim Arbitration Tribunal (MAT) within the U.S. legal framework. Drawing on successful models like the Beth Din in the Jewish community, it argues that a MAT, staffed by arbiters versed in both U.S. and Islamic law, could provide a nuanced approach to disputes involving Islamic principles. Historical, statutory, and Islamic support for religious tribunals in the U.S. is discussed, dispelling fears of potential conflicts with secular state-run courts. Highlighting the United States as an ideal site for a MAT, this Note emphasizes the diversity and educational resources available for future arbiters. It explores past calls for a MAT and underscores the nation's unique demographic and cultural context, positioning it as more adaptable than other countries. The benefits of a MAT, including its potential to relieve pressure on civil courts and provide a forum for nuanced religious concerns, are outlined. To address concerns, the Note proposes protective measures for individual liberties within the MAT framework, including the right to appeal, considerations for public policy, and an unconscionability standard. It concludes by underscoring the necessity of a MAT in the United States, asserting its potential to issue judgments while upholding fairness, equality, and justice within a multicultural framework.

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INTRODUCTION

The possibility of a Muslim Arbitration Tribunal (MAT) staffed by trained Muslim arbitrators with expertise in both Islamic and American law would address some of the growing concerns that Muslims and non-Muslims alike have when utilizing Islamic Law experts in U.S. courts. While citizens are expected to follow secular law, many Muslims choose to conduct most of their lives according to the tenets of their religion, specifically through the many principles and rules of Islamic law that govern many of their daily activities: prayer, food, dress requirements, contractual and financial regulations/prohibitions, and marriage and family law provisions. One important aspect of membership in religious communities is the adherence to a robust system of rules and practices meant to advance shared values.[1] Therefore, a multicultural society cannot just be satisfied with recognizing marginalized minority groups as a half-measured attempt at equality.[2] A diverse society must also share power with minority groups, such as Muslims, giving them the right to practice their religious beliefs the way they see fit within the constraints of the secular state in which they live. This decision thus reframes the word "equality" as giving minority groups equal legal footing to adhere to their respective laws and practices. Scholars have long written about how tribunals can provide the autonomy mentioned. Rabea Benhalim, Michael A. Helfand, and Faisal Kutty have all argued for a MAT in the United States[3] Other scholars such as Asifa Quraishi-

1. *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1275 (2011).

2. *Id.* at 1233.

3. *See generally* Rabea Benhalim, *The Case for American Muslim Arbitration*, WIS. L. REV. 531 (2019) [Hereinafter Benhalim, *The Case*]; Rabea Benhalim, *Religious Courts in Secular Jurisdictions: How Jewish and Islamic Courts Adapt to Societal and Legal Norms*, 84 BROOK. L. REV. 745 (2019) [Hereinafter

Landes, Peter W. Beauchamp, and Eun-Jung Katherine Kim have discussed the concerns with leaving Islamic law in the hands of civil courts.[4]

This Note attempts to bring the two worlds together: a Muslim arbitration tribunal is not only possible but necessary to fix the inadequacies of U.S. courts applying Islamic law and bestows several benefits to the Muslim community. Part I investigates the current realities for Muslims applying Islamic law in their lives. U.S. courts have had difficulty granting Muslims the right to practice their religion as they please.[5] Also, state legislatures have increasingly made utilizing Islamic Law in state courts harder or nearly impossible.[6] There is a healthy debate on how to fix the judicial system when it comes to applying Islamic law in courts, specifically to the use of expert witnesses.[7] The scholars cited later in this Note, however, miss the point: judges will still be the deciding factor on what constitutes good and bad religious law, for which they have no training. Part II then argues that a MAT is possible within the United States, looking at the historical evidence, statutory protection, examples of religious dispute resolution (RDR) bodies in the United States and abroad, and Islamic law's overall acceptance of the *tahkim*.[8] The United States is also in an apt position to adopt such a tribunal, and a MAT will guarantee several benefits to the Muslim community. This Note then concludes with an argument for guardrails that a tribunal should follow to improve fairness and transparency and to avoid their arbitration enforcement and awards from being challenged and vacated in the civil courts.

I. THE JUDICIAL AND POLITICAL LANDSCAPE THAT MAKES A MAT ESSENTIAL

Before arguing for the creation of a MAT in the United States, two realities must be observed. First, American Muslims face a significant disadvantage when asserting their religious liberties in federal courts, as many Muslim Free Exercise

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Benhalim, *Religious Courts*]; Helfand, *supra* note **Error! Bookmark not defined.**; Faisal Kutty, *The Myth and Reality of "Shari'a Courts" in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. ST. THOMAS L.J. 559 (2010).

4. *See generally* Asifa Quraishi-Landes, *Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms*, 57 N.Y.L. SCH. L. REV. 245 (2012–2013); Peter W. Beauchamp, *Misinterpreted Justice: Problems with the Use of Islamic Legal Experts in U.S. Trial Courts*, 55 N.Y.L. SCH. L. REV. 1097 (2011); Eun-Jung Katherine Kim, *Islamic Law in American Courts: Good, Bad, and Unsustainable Uses*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 287 (2014); Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431 (2014).

5. *See* Daniel Pipes, *Don't Bring That Booze into My Taxi*, MIDDLE EAST F. (Oct. 10, 2006), https://www.danielpipes.org/4046/dont-bring-that-booze-into-my-taxi [https://perma.cc/UFZ8-JNRH].

6. *See* cases cited *infra* note 62.

7. *See infra* Part I.C.

8. *See* P (Kate Fleet et al. eds., 3rd ed. 2021). *Tahkim*, known as arbitration in Muslim courts, is defined as "a conflict-resolution method different from adjudication but nevertheless with a long history in Islamic law. In principle, it takes place outside the courts and is voluntary. Parties to a dispute agree to defer to one or many persons—the arbiters or arbitrators—by whose decision they both have agreed to be bound." *Id.*

claimants have a much lower success rate than other religious groups.[9] Second, state legislatures have consistently attempted to prevent state courts from considering Islamic law when addressing any questions of law.[10] These efforts are becoming increasingly successful with the introduction of facially neutral bills that overcome constitutional challenges.[11] This Note then analyzes three proposals for the courts: religious law experts as a supplemental aid, a three-tiered system for determining which religious laws are allowed, and maintaining the status quo.

A. Judicial Failures in Protecting Muslim Religious Liberties

In Minneapolis, Somali Muslim taxi drivers refused to transport passengers carrying alcoholic beverages due to their religious beliefs, as ruled by local Muslim leaders. The Metropolitan Airports Commission attempted to find a solution to satisfy drivers and passengers but ultimately withdrew its support after facing significant public backlash.[12] Some criticized the airport's accommodation policy as "the Sharia . . . with state sanction(s),"[13] and state courts denied the taxi drivers' request for an injunction against the Commission's enforcement of the rule requiring drivers to transport passengers regardless of whether they carry alcohol.[14] This decision left Muslim taxi drivers in a difficult position, forced to choose between their religious beliefs at the risk of facing harsh penalties for refusing to transport passengers carrying alcohol and making a living.[15]

This case highlights the difficulties faced by American Muslims in asserting their right to freely exercise their religion, especially through the lens of a religious obligation. Professors Sisk and Heise conducted an empirical study of over 1,500 cases from federal district and appellate courts between 1996 and 2005 that fall under the Free Exercise Clause (many of which pertain to the utilization of Islamic law), Free Speech Clause, and federal statutes promoting religious freedom, as well as charges of discrimination based on religious conduct or affiliation.[16] The study found that Muslim claimants are significantly less likely than non-Muslims to successfully raise Religious Free Exercise and Accommodation claims, especially in

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9. *See infra* Section I.A.

10. *See infra* Section I.B.

11. *See* Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601 (2013); however, this author is in support of implementing facially neutral bills to prevent Islamic law from being used in court.

12. *See* Ellie Pierce, *Driven by Faith*, PLURALISM PROJECT, https://pluralism.org/driven-by-faith [https://perma.cc/9QK5-X4GX] (last visited Apr. 2, 2024).

13. *See* Pipes, *supra* note 5.

14. *See* Dolal v. Metro. Airports Comm'n, No. A07–1657, 2008 WL 4133517, at *3–4 (Minn. Ct. App. Sept. 9, 2008).

15. *See* Keith Oppenheim, *If You Drink, Some Cabbies Won't Drive*, CNN (Jan. 26, 2007, 12:25 AM), https://www.cnn.com/2007/US/01/25/oppenheim.cabbies/index.html [https://perma.cc/PS34-MNJG].

16. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 233 (2012).

federal appeals courts.[17] The research confirms the findings of a previous study conducted from 1986–1995, which suggested that adherents to Islam are alone among the non-Christian religious faiths regarding their lack of success in U.S. courts.[18] The study additionally found that Muslims were significantly less likely to succeed when claiming unequal treatment or discrimination.[19] In the twenty-year study, claimants from other religious communities were nearly twice as likely to prevail as Muslims, with Muslims succeeding in Religious Free Exercise/Accommodation claims at 22.2% while non-Muslim claimants succeeding at a rate of 38%.[20]

According to the authors, there are three main reasons for this hurdle Muslims face. First, there is a perception that Islam's central tenets are further from the American religious mainstream than Catholic beliefs and Jewish traditions are from the Protestant Christianity that dominated America's religious landscape in the past.[21] Second, the cultural and political obstacles Muslims face today differ from those that Catholics and Jews encountered in a Protestant-Christian hegemony in the nineteenth and early twentieth centuries.[22] Muslims face opposition from members of other faiths and a growing number of secularists in judicial life.[23] Finally, the study found that implicit biases and stereotypes from individual judges can result in many claims failing.[24] The authors suggest that judges must strive for impartiality, focus on gathering individualized information about the claimant, and be aware of and overcome stereotypes and biased inferences that could affect their unconscious decision-making.[25] The Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente União do Vegetal* may help judges overcome stereotypes and evaluate each religious liberty claim on its own merits.[26] The Court held that judges hearing religious-liberty claims must move beyond category-based processes and instead devote concerted attention to individuating methods that focus on the claimant's particular attributes,[27] thereby loosening the grip of stereotypes. It is crucial to apply this approach to all religious claimants equally.

This case and the call for concentrated attention to particular attributes are crucial in utilizing Islamic legal experts when dealing with religious-liberty claims.

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17. *Id.* at 237–49.
18. *Id.* at 260.
19. *Id.* at 249.
20. *Id.* at 251–52.
21. *Id.* at 261.
22. *Id.* at 263–267; *see also* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 7–8 (2006) (arguing that neither Christian evangelicals nor legal secularists is favorably disposed toward a full-fledged participation by Muslims as "people of faith in American public life").
23. *Id.* at 263.
24. *Id.* at 282.
25. *Id.* at 285–86.
26. *Gonzales v. Vegetal*, 546 U.S. 418 (2006) (holding that a church had effectively demonstrated that its sincere exercise of religion was substantially burdened, but that the government failed to demonstrate that the application of the burden to the church would, more likely than not, be justified by the asserted compelling interests).
27. *Id.* at 430.

Federal Rule of Civil Procedure (FRCP) 44 states that in determining foreign law, a court may consider any relevant material or source, including expert witness testimony, whether submitted by a party or admissible under the Federal Rules of Evidence.[28] A court may consider materials not offered by the parties and take judicial notice of foreign law.[29] The problem, however, is that Islamic law is far more than the law codified by statutes and constitutions made by foreign Muslim-majority countries. As introduced by Professor Wael B. Hallaq, *fiqh* pertains to all aspects of a Muslim's life[30] and is adopted by Muslims all over the world, separate from the statutes codified in Muslim-majority countries.[31] In these cases where the court does not need to utilize foreign law, experts need to be called not for their knowledge of a foreign country's statutes and judicial precedent but for their knowledge of the Islamic legal tradition, their understanding of the sources of the religious law, and the lessons they learn from scholars within the school of law that the parties may point to. These experts are used in federal courts and some state courts.[32] Unfortunately, however, it is becoming increasingly difficult to utilize *Islamic law* in state courts.[33]

B. State Legislatures Introducing Anti-Sharia Bills

From 2010–2019, forty-four states introduced 232 bills calling for limiting or banning U.S. state and federal courts from considering Islamic law in their legal rulings.[34] Of these bills, twenty were enacted within thirteen states.[35] These bills can generally be categorized into two groups: legislation that specifically bans Sharia as a set of laws in their jurisdiction and legislation that appears neutral at first glance known as the "American Laws for American Courts" (ALAC).[36] One example of

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28. FED. R. CIV. P. 44.1; *see also* FED. R. EVID. 702 (allowing for the use of experts in federal court proceedings, including experts in foreign law. This rule states that an expert witness may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence).

29. *See* Aleem v. Aleem, 947 A.2d 489, 500–01 (Md. Ct. Spec. App. 2008) (holding that when the husband went to the Pakistani embassy in Washington and executed a talaq (a unilateral, nonjudicial divorce), "the enforceability of a foreign talaq divorce provision . . . where only the male, i.e., husband, has an independent right to utilize talaq and the wife may utilize it only with the husband's permission, is contrary to Maryland's constitutional provisions and thus contrary to the 'public policy' of Maryland").

30. *See* WAEL B. HALLAQ, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS 3 (2009).

31. *Id.* at 443.

32. *See* S.D. v. M.J.R., 2 A.3d 412, 417 (N.J. Super. Ct. App. Div. 2010) (reversing a district court decision in which the court found a husband not guilty of sexual assault when he physically and sexually abused his wife, citing his belief that, as the husband, he had the right to have sex whenever he wanted. This reversal emphasized the responsibility of courts to protect victims of such violence.).

33. *See* Jay M. Zitter, Annotation, *Application, Recognition, or Consideration of Islamic Law by Courts in United States*, 82 A.L.R. 6th 1 (an annotation that collects and discusses state and federal cases that have considered Islamic law involving torts, contracts, family law, etc.).

34. *See* U.C. BERKELEY HAAS INST. FOR A FAIR & INCLUSIVE SOC'Y, DATABASE OF ANTI-MUSLIM LEGIS., https://belonging.berkeley.edu/islamophobia/islamophobia-legislative-database [https://perma.cc/X88C-M5SF] (last visited Apr. 2, 2024).

35. *Id.*

36. Kelley, *supra* note 11, at 614.

Sharia-specific legislation is the State Question 755, known as the "Save Our State Amendment," which would bar Oklahoma state courts from considering Islamic law in making judicial decisions. This ballot and other bills forbid state courts from considering international or Sharia law when deciding cases.[37] While proponents argue that they pass constitutional muster, the specific reference to Sharia law in the text makes the secular legislative purpose of the bills seemingly questionable. This language could, in turn, make such bills appear to put Sharia at a disadvantage, thus violating the Establishment Clause.[38] Furthermore, these bills may burden Muslims' religious beliefs and be considered overbroad if they fail to isolate Sharia law's specific discordant features. This would violate the Free Exercise Clause. Thus, most Sharia-specific legislations have not been enacted or have been struck down by a federal court.[39]

Though only twenty bills have been enacted, most of the anti-Sharia bills introduced in the late 2010s that have passed constitutional muster have been ALAC bills. These bills typically include a clause prohibiting foreign law in American courts where it would result in a conflict with rights guaranteed by the constitution of the state or the United States.[40] The ALAC defines foreign law as "any law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations and tribunals, and applied by that jurisdiction's courts, administrative bodies, or other formal or informal tribunals."[41] ALAC bills are designed to be facially neutral and affect all religions equally, which may help them pass the Establishment Clause's Lemon test and the Free Exercise Clause.[42]

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37. For bills that specifically identify and ensure that courts do not consider Islamic law, seeH.R. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.R. 597, Reg. Sess. (Ala. 2011); S. 62, Reg. Sess. (Ala. 2011); H.J. Res. 31, 96th Gen. Assembly, 1st Reg. Sess. (Mo. 2011); S.J. Res. 18, 50th Leg. Sess., 1st Sess. (N.M. 2011); H.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); H.R. 301, 126th Leg. (Miss. 2011) (bills that specifically identify and ensure that courts do not consider Islamic law).

38. Kelley, *supra* note 11, at 621.

39. *See* Save Our State, H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); *see also* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (blocking a "Save Our State Amendment" on grounds that it effectively bans Sharia law from legal proceedings and undermines religious liberty as protected by the Free Exercise Clause of the Constitution). Challengers of the "Save Our State Amendment" in this case argued that it would disable a court from probating a Muslim citizen's will and testament, which incorporated aspects of what the amendment defined as Sharia Law. *Id.* Thus, the court could not enforce an official government message that Muslims are religious and political outsiders in their own state. However, the court still stated that Sharia law is not actually law because it lacks a legal character but is instead a set of religious traditions that differ among Muslims that merely give guidance to Muslims. *Id.*

40. *E.g.*, LA. REV. STAT. ANN. § 9:6001 (2010) (requiring that judges not look to "the application of a foreign law [that] will result in the violation of a right guaranteed by the constitution of this state or of the United States, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state").

41. AMERICAN PUBLIC POLICY ALLIANCE, http://publicpolicyalliance.org/legislation/model-alac-bill/ [https://perma.cc/CNW6-DMQ2] (last visited Apr. 2, 2024). Courts are already prohibited from creating results that conflict with the rights guaranteed by the United States and state constitutions. There is no indication that ALAC bills do more than repeat this prohibition.

42. *See also* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) ("[T]his Court has abandoned

Therefore, a sizable percentage of Muslims in America face issues on two fronts. Federal courts recognize religious liberties at a lower rate for Muslims than any other religious group.[43] Furthermore, over a quarter of the states in the United States have enacted some form of anti-Sharia legislation meant to prohibit judges from even considering Islamic law in any case.[44]

C. Possible Solutions for the Courts Analyzed

Islamic Law Professor Khaled Abou El Fadl has been an expert witness in many court cases dealing with various issues. However, he is most frequently retained to explain the legal principles surrounding the issue of women in divorce proceedings and their rights within Islamic Family Law. In his book, *Reasoning with God Reclaiming Shari'ah in the Modern Age*, Professor Abou El Fadl laments that his advice to the courts falls on deaf ears.[45] In one such case, he argues that the same principles and maxims that produced the one-year support rule (that a man who initiates divorce proceedings must provide alimony to the woman for a maximum of one year) can now be reapplied to provide for a legal rule that is more responsive to contemporary realities.[46] Additionally, some jurists argue that a divorcée is sometimes entitled to support until remarriage or death.[47] However, in this case, as in others where Professor Abou El Fadl has acted as an expert witness, the husband retained the services of a local imam to declare that the judgment of the Qur'an and Sunna does not require such additional support.[48] Professor Abou El Fadl states that it is usually the Imam, who "would be adorned with a beard and dressed in a robe," that convinces the court that the one-year rule is an Islamically mandated positivist law that can be applied in American courts.[49] He argues that it is usually "the power of the performance of religiosity and the affectations of piety, the stance taken by the imams on behalf of husbands [that] becomes associated with the more genuinely Islamic."[50] This is one example of how courts fail to utilize religious legal expertise, as courts are not, nor are expected to be, equipped in the nuances of discerning between two potentially correct legal positions.

Lemon's 'ahistorical, atextual' approach to discerning Establishment Clause violations" for an approach that emphasized "reference to historical practices and understandings;" new developments may alter how state legislatures attempt to restrict the use of Islamic law in state courts.).

43. *See* Sisk, *supra* note 15.

44. *See infra* Part I.B.

45. *See* KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE 77 (2014).

46. *Id.* at 93.

47. *See* Muhammad Adal El Sheikh, *Post-Divorce Financial Support from the Islamic Perspective (Mut'at-al-talaq)*, *in* 9 CONTEMP. APPROACHES TO THE QURAN AND SUNNAH 172, 173 (Mahmoud Ayoub ed., 2012) (arguing that postdivorce maintenance is one of the rights "fixed" in Islamic law for women, in addition to dowry, maintenance during the marriage, and inheritance upon the death of the husband); *see also* QUR'AN 2:241 ("And for divorced women is a suitable Mut'at. This is a duty on the righteous.").

48. ABOU EL FADL, *supra* note 45, at 93.

49. *Id.*

50. *Id.*

U.S. courts have struggled to determine how they should interact with Islamic law. This relationship is particularly important in a post-9/11 world, given that the current relationship between the U.S. legal system and Islamic law is oftentimes strained. Nevertheless, many judicial decisions still rely on Islamic law in various situations, such as where the parties contractually agreed to be bound by Islamic law or in cases in which foreign law is applicable and such law is that of a country strictly following Islamic law.[51] These cases illustrate that the debate over Shariah bans often misses the nuanced discussion on where Islamic law can apply without depriving people of their constitutional rights. When courts try to introduce expert witnesses in Islamic law, judges tend to fail in their ability to distinguish coherent arguments from experts who simply show religiosity, as seen in the case of Professor Abou El Fadl. Furthermore, while other cases do have competent experts, the inherent pluralistic nature of Islamic law makes it impossible for U.S. courts to legitimately rely upon the expert opinion of Islamic legal scholars in the same way that expert legal opinion has traditionally been applied in legal proceedings. Utilizing expert witnesses can prove difficult when both parties have highly credentialed experts who are technically correct but have differing opinions:

> The purpose of admitting expert testimony in U.S. courts is to explain and to illuminate for the trier of fact certain "true" facts which the fact finder would otherwise fail to comprehend due to a lack of expertise. This premise does not fit when weighing issues of Islamic law. Islamic law has, since its inception, been a pluralistic field insofar as multiple, differing interpretations of a single legal issue can concurrently be "true," depending upon the myriad lenses and approaches available for properly engaging with the subject. However, a U.S. court's need to concretely establish certain questions of fact and law in order to adjudicate a controversy arising under either U.S. or Islamic law will necessarily mean that one or another Islamic legal expert's opinion will carry the day.[52]

Three proposals to reform the use of Islamic law merit discussion. The first, proposed by Peter W. Beauchamp, a civil litigator in New York, argues for a hands-off approach to the problem.[53] He suggests that U.S. courts should view expert Islamic legal opinion as a mere supplemental aid to the trier of fact rather than as a firm basis to ground legal decisions.[54] Ultimately, U.S. courts should decide controversies based on what the fact finder deems to be a just outcome, as colored by their familiarity with the framework of U.S. policy, precedent, and principles.[55] While much better than the all-or-nothing approach of the Shariah ban, this approach

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51. *E.g. In re* Marriage of Obaidi & Qayoum, 226 P.3d 787 (Wash. Ct. App. 2010) (holding that a $20,000 Mahr agreement was invalid under neutral principles of contract law).

52. Beauchamp, *supra* note 4, at 1099.

53. *Id.* at 1097.

54. *Id.*

55. *Id.*

still treats Islamic law as alien to the ways of the U.S. courts that it should hardly be mentioned. When members of the Muslim community are structuring their marital or financial life around precepts of Islamic law, for instance, they do not treat such principles as supplementary but as critical components of their decisions.[56]

A second solution proposed by Professor Eun-Jung Katherine Kim requires further analysis. explains the distinction between good, bad, and unsustainable uses of Islamic law in American Courts..[57] The "Good" ways of using Islamic law are those advocated from a position of state neutrality toward different religious doctrines, where the state does not have rational grounds to resolve the disagreement or assess the degrees of reasonableness of the different religious doctrines and their interpretations.[58] This method can be conducted in two ways: through the prohibition of governmental interference in the protected sphere of religious organizations[59] or through the prohibition of showing a preference for one religion over another.[60] A "bad" implementation of Islamic Law in courts would be one that undermines a litigant's existing constitutional rights.[61] However, if there is a way to utilize Islamic law while preserving existing rights, the court should be encouraged to find this avenue through the use of expert witnesses.[62] While "bad" interpretive methods should be avoided, they should not be eliminated as an option for cases involving noncitizen litigants, such as if an American marries a foreign national in Islamic courts overseas. However, an "unsustainable" use of Islamic law prevents the state from protecting the safety of its citizens.[63] U.S. courts have a duty to protect all individuals within their borders, regardless of citizenship status.[64]

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56. In the context of marriage, Islamic law dictates various guidelines regarding the rights and responsibilities of spouses, the process of marriage, and issues such as inheritance and divorce. For Muslim couples, adherence to these principles is not merely a matter of tradition but a religious obligation believed to lead to a harmonious and righteous marital life. *See also* HALLAQ, *supra* note 30, at sec. 8.

57. Kim, *supra* note 4.

58. *Id.* at 290.

59. *Id.* at 291; *see also* El-Farra v. Sayyed, 226 S.W.3d 792 (Ark. 2006) (recognizing that the authority of Islamic law in governing the hiring and firing of an imam within a religious organization falls under the "ministerial exception," a doctrine rooted in the First Amendment that prevents employees who perform a religious function from suing their employers (i.e., religious organizations) over most employment disputes; a judgment on whether an imam fulfilled the mission of the religious organization would involve using Islamic law as the basis of the assessment).

60. Zitter, *supra* note 33.

61. Kim, *supra* note 4, at 294; *see also* Tarikonda v. Pinjari, No. 287403, 2009 WL 930007, at *1 (Mich. Ct. App. Apr. 7, 2009) (holding by the appellate court that the triple talaq is "violative of due process and contrary to public policy" because the wife had no right to prior notice of the triple talaq or to be present at the pronouncement. However, the parallel, where nonenforcement of foreign judgements rendered through Islamic law, might impose restrictions on religious liberty.).

62. *Id.*; *see also* Jabri v. Qaddura, 108 S.W.3d 404, 407 (Tex. Ct. App. 2003) (refusing to enforce the dowry agreement, arguing that the agreement treated the woman as a commodity with a purchase value; this distinction can be found when comparing two cases involving Islamic marriage contracts); *but see* Odatalla v. Odatalla, 810 A.2d 93, 95 (N.J. Super. Ct. Ch. Div. 2002) (enforcing the agreement, emphasizing the value of autonomy and voluntary choice). These different judgments reflect different views on how to balance moral equality with religious liberty.

63. Kim, *supra* note 4, at 303.

64. *Id.*

This duty may require the refusal to recognize foreign judgments that fail to protect basic rights, even if the judgments do not contradict public policy or violate rights.[65] Professor Kim comes to these different categories by examining the tension between religious liberty and moral equality, two crucial pillars of a liberal democratic society.[66] The author contends that courts must carefully balance these values to ensure that individuals are treated with equal concern and respect.[67] However, this continues to cede power to a juristic body that does not have the prerequisite education to determine what religious law would be appropriate. While judges should comment on rulings that protect the safety of their citizens, several areas in religious law, such as family and finance law, require an education the majority of judges do not (nor should they be expected to) have.

A third proposal, brought by Professor Eugene Volokh, requires courts to approve the status quo in certain areas of the law. He argues that American law already provides for religious exemptions, freedom of contract, and arbitration (which can include Islamic principles).[68] Muslims, like Christians, Jews, and those of other religious backgrounds, can write contracts and wills to implement their understanding of their religious obligations. For example, Muslims, like adherents of other religions, are afforded the freedom to seamlessly integrate Islamic legal principles into their estate planning. This enables them to express their religious obligations through various instruments, ensuring that their testamentary desires align with the rich tapestry of Islamic legal precepts.[69] Moreover, marriages entered into that were valid in other countries are valid in America barring public policy exceptions.[70] However, some states incorporated religious law into their family law, whilst other states require that legal questions of family law be resolved under the law of the religious community to which the parties belong.[71] These are instances where normal functions of regular life are deeply rooted in religion. While some

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65. *Id.*; *see also* Hosain v. Malik, 671 A.2d 988, 999 (Md. Ct. Spec. App. 1996) (involving a custody dispute between Pakistani parents where the Maryland court granted comity to a Pakistani court order that gave sole custody to the father, despite the potential danger to the mother's physical security if she returned to Pakistan). The Maryland court's decision to grant comity to the foreign judgment raises questions about the proper scope of application for the principle of protection and the duty of U.S. courts to protect all persons within their borders, including noncitizens.

66. *Id.* at 295.

67. *Id.*

68. Volokh, *supra* note 4, at 431.

69. *See generally,* YASER ALI & AHMED SHAIKH, ESTATE PLANNING FOR THE MUSLIM CLIENT (2021). This is the only practice treaty on Islamic Estate Planning in the United States and has become a source for lawyers to help Muslim clients abide by Hanafi law in creating wills, trusts, or waqf, an estate devise used for religious, educational, or charitable causes.

70. Restatement (Second) of Conflict of Laws § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

71. *See* Volokh, *supra* note 4, at 431. *See also* Hirschkorn v. Hait, 2008 WL 695892, at *7-8 (N.J. Super. Ct. App. Div. Mar. 17, 2008) (noting this and enforcing the order of an Israeli Rabbinical Court entered in an Israeli Jewish divorce).

contracts and foreign judgments are unenforceable, Professor Volokh sees the idea of "creeping Sharia" as misguided, partly because the complaints miss how Muslims, like other religious minorities, can write Islamic precepts within their marriages, divorce, wills, business contracts, etc. These clauses would not infringe on existing constitutional precepts.[72] Almost nodding to Professor Kim, he sees that most cases fall within the "good" use of Islamic law. For example, courts can consider the law of foreign countries that apply Shariah. If a couple got married in a country where Sharia applies, American law would evaluate the validity of their marriage based on whether Sharia formalities were complied with in that country.[73] Furthermore, while most states in the United States follow the well-settled rule of applying tort laws of the place where the injury occurred, this application can become complicated when the foreign entity is subject to Sharia law.[74] The American public should not have to worry about "creeping Sharia," as American judges use various judicial tools, such as comity, public policy, and unconscionability, to balance requests for consideration of religious law with constitutional and legislative principles.[75]

However, Professor Volokh does concede that parties cannot rely on secular judges to interpret Islamic law.[76] This interpretation must be made using private parties, such as Islamic arbitral organizations, to interpret their agreements.[77] The three proposed reforms—by Mr. Beauchamp, Professor Kim, and Professor Volokh—ultimately present a common challenge. Mr. Beauchamp recommends a hands-off approach, suggesting that U.S. courts should treat expert Islamic legal opinions as supplementary aids rather than firm grounds for decisions.[78] Professor Kim proposes a tiered system for the utilization of Islamic law in U.S. courts, distinguishing between "good" and "bad" ways of application.[79] Professor Volokh argues for maintaining the status quo, asserting that existing American law accommodates religious exemptions, freedom of contract, and arbitration, including Islamic principles.[80] While all of these recommendations merit discussion, they still do not thoroughly address the crisis of authority discussed by Professor Abou El Fadl. Judges are still unable to see which expert witness would be correct and whether they should be used as a recommendation, as dispositive rules, or not at all in some cases.

II. Opting Out: The Case for Muslim Arbitration Tribunals

Another solution to the issue of Muslim Americans navigating the U.S. court system is to create an arbitration tribunal for the Muslim community, thus initially

72. Volokh, *supra* note 4, at 433.
73. *Id.* at 439.
74. *Id.* at 440.
75. *Id.*
76. *Id.* at 437.
77. *Id.*
78. Beauchamp, *supra* note 4.
79. Kim, *supra* note 4.
80. Volokh, *supra* note 4.

opting out of the courts.[81] This tribunal would consist of arbiters trained in both Islamic law and American law, allowing them to approach a party's claims with more context and nuance. Such a tribunal could prevent courts from interpreting *fiqh* as a static collection of legal rules many in the Islamic jurisprudence world would struggle to reconcile with their lived realities.[82] The concept of a religious arbitration tribunal has already proven successful in the Jewish community with the Beth Din, which offers Jewish Americans the option of resolving their disputes before arbiters aware of the particular laws and social realities of Jewish life.[83]

This Section argues that a MAT is possible within the United States. It will first look at the supporting history for religious arbitration in the United States, the statutes that protect the right for such a tribunal, and the legality of arbitration in Islamic law. Next, the Section points out several different religious dispute resolution (RDR) bodies in secular constitutional states to show that arbitration tribunals tend towards adherence to the norms of the state rather than as a forum to escape individual protections. The section will then argue that the United States has a unique advantage in establishing this ADR system, which will benefit the Muslim community. This Section will conclude by providing steps to ensure that the MAT will be fair and transparent for the community it serves.

A. Is a MAT Permissible in the United States?

1. The Permissibility of a MAT through a Historical, Statutory, and Islamic Lens

The United States has a long history of allowing religious tribunals to operate legally.[84] The American colonial experience, where a plurality of churches was established in the colonies, led to the development of a culture of utilizing alternative dispute resolution, specifically Christian colonists looking to the Bible to support church-based dispute resolution.[85] The history of the country's colonial and early years of statehood suggests a concerted effort by the British colonies to preserve religious pluralism, creating a federation of states that supported a variety of established churches, some of which were state-sanctioned.[86] Unlike their European, English, Muslim, Canadian, and other counterparts, within the American experience, there was "competition between state- and church-sponsored dispute resolution," as well as areas in which no "civil alternatives" existed to the "church dispute resolution."[87]

Contemporary religious ADRs in America are mostly in the form of arbitration, where arbitrators are often leaders in their respective religious

81. Quraishi-Landes, *supra* note 4, at 255.

82. *Id.*

83. *Id.*

84. Benhalim, *The Case*, *supra* note 3, at 566.

85. *Id.* (citing Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 509–14 (2012)).

86. *Id.* at 566 ("This commitment to allowing religious courts a place in America's legal framework originates out of our colonial history.").

87. *Id.* at 567.

communities. The statutory support for arbitration stems from the Federal Arbitration Act (FAA), which permits religious arbitration tribunals to operate alongside their secular counterparts.[88] The FAA provides a legal framework for agreements to settle disputes via arbitration.[89] These arbitral decisions are typically enforceable in civil court, and the court is generally prohibited from a substantive review of the decisions.[90]Also, there is some support within the limited experience American courts have when looking to American Muslim arbitration.[91] The appellate court in *Jabri v. Qaddura* treated the agreement to arbitrate as a typical contract and did not question the validity of the application of Islamic law by the Texas Islamic Court.[92] In treating the agreement as a contract, the court issued the standard that "[i]f a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."[93] Therefore, the MAT would have historical support, statutory support, case law precedent, and parallel systems among their Jewish counterparts that promote the tribunal's legality and viability.

Islamic law also encourages out-of-court dispute resolutions in addition to its call for Muslims to obey the law of the land, provided that the law does not require them to commit a sin.[94] The actual practice of arbitration can be found in the example of the Prophet Muhammad. The Prophet Muhammad famously served as an arbitrator: during his prophethood, he served as one between Muslims and between Muslim and non-Muslim community members.[95] Arbitration can find its support primarily in the Quran: scholars primarily rely on the Quranic verse 4:35, which describes the processes of resolving spousal dissent, as justification for the permissibility of arbitration. Verse 4:35 states, "And if you fear dissension between the two of them (spouses), then send an arbitrator from his family and an arbitrator from her family, and if they both want peaceful justice, God will cause reconciliation between the two of them."[96] Finally, all major schools of jurisprudence in both Sunni and Shia Islam accept *tahkim* as a legitimate means of resolving disputes,

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88. 9 U.S.C. §§ 1–16 (1947).

89. *Id.* at § 5, 9.

90. Benhalim, *The Case*, *supra* note 3, at 569.

91. *Id.*

92. Jabri v. Qaddura, 108 S.W.3d 404, 407 (Tex. App. 2003).

93. *Id.* at 411.

94. *See* QUR'AN 4:60 ("O ye who believe! Obey Allāh, and obey His Messenger and those who are in authority among you."); *see also* MUHAMMED IBN ISMAIEL AL-BUKHARI, SAHÎH AL-BUKHÂRI 4 HADITH 1, 130 (Dr. Muhammad Muhsin Khan trans., 1997) ("A Muslim has to listen to and obey (the order of his ruler) whether he likes it or not, as long as his orders involve not one in disobedience (to Allah), but if an act of disobedience (to Allah) is imposed one should not listen to it or obey it.").

95. *See* AHMED S. MOUSSALLI, *An Islamic Model for Political Conflict Resolution: Takhim (Arbitration), in* CONFLICT RESOLUTION IN THE ARAB WORLD: SELECTED ESSAYS 45 (Paul Salem ed., 1997); *see also* Muhammed Abu-Nimer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, 55 AM. J. ECON. & POL. 35 (1996).

96. MOUSSALLI, *supra* note 95; Abu-Nimer, *supra* note 95; see also QUR'AN 4:59, which states, "If you judge between people, then judge with justice." Likewise, *Quran* 5:43 states, "If you judge, then judge between them with fairness."

although they differ in some jurisdictional and procedural requirements.[97]

2. Religious Dispute Resolution Bodies Adherence to Secular Environments

The overarching fear for most opposing a tribunal is that a religious dispute mechanism such as a MAT would not adhere to the authority of the secular courts.[98] Therefore, calls for creating a MAT are invariably calls for creating a legal body that may violate constitutional protections and liberty interests. However, such concerns have little foundation in reality. RDR bodies that serve minority populations across the world have adapted to the secular norms of the state in which the body conducts its business. Along with other religious ADRs,[99] the Muslim Arbitration Tribunal in the U.K., the Beth Din in the United States, and the Sharia courts in Israel have all shown to survive (and in some cases thrive) when sharing power with the national courts, despite the heavy restrictions placed upon them.[100]

The MAT in the U.K. has emerged as the most successful RDR for Muslims, operating as an arbitral body and advisory body that issues nonbinding opinions. Islamic ADR in England emerged from a meeting in 1982 of Islamic scholars in Birmingham[101] but continues to be negotiated in modern times through the Arbitration Act of 1996.[102] They had intended to create a "new Britain-wide shari'a

97. Benhalim, *The Case*, *supra* note 3, at 571 (citing Lee Ann Bambach)("That Ye Judge with Justice" Faith-Based Arbitration by Muslims in an American Context, 177 (2014) (Ph.D. dissertation, Emory University (on file with author)).

98. Benhalim, *Religious Courts*, *supra* note 3, at 747–49.

99. *See also* Anna C. Korteweg & Jennifer A. Selby, *Introduction: Situating the Sharia Debate in Ontario*, *in* DEBATING SHARIA: ISLAM, GENDER POLITICS, AND FAMILY LAW ARBITRATION 22 (Anna C. Korteweg & Jennifer A. Selby eds., 2012); Paula Hodges, Charles Kaplan & Peter Goodwin, *KLRCA's New I-Arbitration Rules: A New Option For Islamic Finance Parties*, HERBERT SMITH FREEHILLS (Oct. 11, 2012), https://hsfnotes.com/arbitration/2012/10/11/klrcas-new-i-arbitration-rules a-new-option-for-islamic-finance-parties/ [https://perma.cc/SGB6-K7FQ]; KLRCA I-ARBITRATION RULES, Rule 8, KUALA LUMPUR REG'L. CTR. FOR ARB. (Sept. 20, 2012), http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA_i-Arbitration_Rules.pdf [https://perma.cc/WW5X-6LZS]. This arbitration tribunal allow parties to use Sharia law to resolve their international commercial arbitration disputes. The rules provide for the arbitral tribunal to send Sharia law issues to a Sharia expert or an approved Sharia advisory council to determine the relevant Sharia principles that should apply. These rules help attract Islamic finance and commercial parties to Malaysia, which is the world's largest Islamic bond market and center of Islamic finance.

100. Benhalim, *Religious Courts*, *supra* note 3, at Part II.A.1.

101. *See* JOHN R. BOWEN, ON BRITISH ISLAM: RELIGION, LAW, AND EVERYDAY PRACTICE IN SHARI'A COUNCILS 47 (2016). The MAT "provides a network of relatively formal and transparent arbitral tribunals for British Muslims." Michael J. Broyde, Ira Bedzow & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 HARV. J. RACIAL & ETHNIC JUST. 33, 44 (2014). It has become the most visible Muslim arbitration in England, established in 2007 with the mission "to provide British Muslims with a more effective alternative for resolving disputes in accordance with Islamic law." *Id.* at 37.

102. Arbitration Act 1996, c. 23 (U.K.). Only some religious disputes of a commercial nature "may be resolved through binding arbitration" under the Act. While the Act clearly allows for religious arbitration of commercial matters, it does not prohibit "a religious body from supervising such an arbitration procedure . . . as long as proper contractual procedures are followed." Similar to the situation in the United States, the Act "limits the conditions under which either party may appeal," such that "appeals are allowed

council" that would address "a wide range of religious issues, from banking and mortgages to standards for halal food." The MAT website differentiates itself from other Islamic RDRs in England by highlighting its ability to "adher[e] to the English Legal System whilst still preserving . . . practices of Islamic Sacred Law."[103] This ADR comes after much controversy from the country's political sphere, where calls for the prohibition of Islamic ADRs are made from movements such as the "One Law for All" and from members of the U.K. Parliament.[104] Nevertheless, the tribunal sought to align their respective religious laws with the state's secular norms of substantive justice via the preemptive use of prenuptial agreements and standardized marriage contracts to alleviate inequalities in divorce proceedings.[105] These reforms were critical for the country in general: at least one study had shown that "less than half" of Muslim women who married "a partner domiciled in England had registered their marriages according to civil law, meaning that the largest group of women in [the] sample were in effect unmarried according to English family law."[106] Scholars have interpreted this data to show that British Muslims "intentionally choose to avoid using state law" but that most women had "expected their religious marriages to be registered in accordance with the Marriage Acts."[107] Thus they believed they were enjoying the protections of civil marriages despite avoiding them. In those instances where these women sought a divorce, they were shocked to learn that they did not have the protections of civil marriage. However, later adoption of the MAT allows not only for their religious grievances to be addressed in cases of divorce but also to maintain some protections that civil marriages have.[108]

In the United States, the Beth Din of America (BDA) is one of the country's

on grounds that the procedures followed were unfair or misleading." *Id.*

103. *About Us: History*, MUSLIM ARB. TRIBUNAL, https://web.archive.org/web/20150912095438/http://www.matribunal.com/history.php [https://perma.cc/5J8U-TLWQ] (last visited Apr. 11, 2024).

104. *See* Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation*, 87 CAN. B. REV., 391, 420 (2008); *see also* Frank Cranmer, *Sharia Law, the Arbitration Act 1996 and the Arbitration and Mediation Services (Equality) Bill*, L. & RELIGION U.K. (Oct. 24, 2012), https://lawandreligionuk.com/2012/10/24/sharia-law-the-arbitration-act-1996-and-the-arbitration-and-mediation-services-equality-bill/ [https://perma.cc/6TVV-FX8U] (suggesting that England and Wales should adopt at least some of the provisions of the Ontario Family Statute Law Amendment Act 2009, which banned all religious arbitration in reaction to the Ontario Sharia Debate where Lord Alexander Charles Carlile, Baron Carlile of Berriew, emphasized the need for a more secular approach to family law).

105. *See UK: Muslim Institute Launches Model Muslim Marriage Contract*, *Women Living Under Muslim Laws*, MUSLIM INST. (Aug. 11, 2008), https://wrrc.wluml.org/node/4749 [https://perma.cc/YTK7-BA4L]. New standard marriage contracts include provisions such as (1) removing the requirement for a "marriage guardian" (*wali*) for the bride, who, as an adult, can make up her own mind about whom to marry; (2) enabling the wife to initiate divorce and retain all her financial rights agreed in the marriage contract; and (3) forbidding polygamy whether formally or informally in the United Kingdom or abroad. *Id.*

106. Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 338 (2012).

107. Benhalim, *Religious Courts*, *supra* note 3, at 782.

108. *See* BOWEN, *supra* note 101.

foremost RDR bodies, providing a sprawling network of Jewish law courts that function as fully legal, halakha-compliant arbitration panels.[109] Parties can arbitrate such matters as property distribution, alimony, child support, and custody agreements, but divorce must go through the civil courts.[110] Historically, Jewish arbitration took on different forms, including the pre-World War I Kehillah tribunals and the creation of different arbitral bodies for the Ultra-Orthodox, Orthodox, and Conservative communities.[111] Their contemporary counterparts must now meet procedural requirements of the Federal Arbitration Act (FAA)[112] and model their procedural rules to that of the federal courts, and a future MAT would follow the same constrictions.[113] Both the BDA and a possible MAT adapt to societal and legal norms in secular jurisdictions for two reasons: their ability to function is contingent upon their civil courts not vacating their decisions upon appeal and their ability to accommodate the secular norms expected out of their religious practitioner. Citizens abiding by religious law living in secular countries are aware of their rights under secular laws and, in some instances, come to expect the preservation of those rights by these ADRs. This expectation is particularly true regarding women's rights.[114] Accommodating the secular courts—at least regarding their procedure in arbitrating—is an act of self-preservation in the eyes of the nation and the Muslims they assist.

Finally, the Rabbinical[115] and Sharia courts in Israel historically operated independently of the state-operated courts created under the Ottoman Empire's Millet System.[116] The Sharia courts serve the Arab Muslim population of Israel and

109. *See* MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 138 (2017).

110. *Id.*

111. *Id.* at 121.

112. *See* 9 U.S.C.A. § 10; *see also* Benhalim, *Religious Courts*, *supra* note 3, at 780 ("[C]ivil courts do not differentiate between secular, commercial arbitration and religious arbitration, simply treating them all as arbitration.").

113. *See* BETH DIN OF AM., RULES AND PROCEDURES (2013), http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf [https://perma.cc/P63F-C55R] ("The Beth Din of America adjudicates disputes in a manner consistent with secular law requirements for binding arbitration so that the resolution will be enforceable in the civil courts of the United States of America, and the various states therein.").

114. *See* Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States, in* WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 177, 183–85 (Lynn Welchman ed., 2004). Both Jewish and Muslim women have initiated movements calling for their equal treatment under religious law. *Id.* These women often seek change within religious law itself and call upon Religious Judicial Bodies to support them in ruling in more equitable ways. *Id.*

115. *See* MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 74 (1994). The Rabbinical courts refuse to reform religious law to meet the needs of the entire Jewish population, protecting its autonomy against external interference, and ignoring the increasing expansion of civil law into the area of family law; they claim to be bound only by religious law and not by state law or by precedents set by the Supreme Court. *Id.* at 70–72. While this may alarm many who oppose a MAT in the United States, it is important to note that the Rabbinical courts enjoy this confidence and independence only because a sizable majority of the populations support such a separation between secular and religious courts. *Id.* at 54–56.

116. *See* Aharon Layish, *Adaptation of a Jurists' Law to Modern Times in an Alien Environment:*

represent a degree of legal autonomy enjoyed by the Arab Muslim population.[117] Both courts enjoy exclusive jurisdiction in some areas of personal law and concurrent jurisdiction with civil courts in others.[118] Further civil legislation had limited the Ottoman codes[119] that present-day Sharia courts rely on.[120] Finally, the Supreme Court of Israel has asserted its jurisdiction over the Sharia courts.[121] In response, the Sharia Court of Appeals has issued internal reform initiatives[122] and has looked to the laws of regional Muslim-majority countries like Egypt and Jordan rather than abandon religious law in favor of secular paths to reform.[123]

B. The United States as a Perfect Site for a MAT

A few factors point to a MAT in the United States being successful. First is that resources are available for future arbiters on a path to dual system fluency in both U.S. and Islamic legal traditions. Zaytuna College, the first American accredited Muslim undergraduate college, has six courses on Islamic law, two for the issues surrounding individual worship and four directly related to skills that could be applied in a mediation or arbitration context, covering topics such as Islamic jurisprudence, family law, inheritance, and commercial law.[124] The college also released an accredited master's degree in Islamic text in 2018, aimed at training leaders with fluency in Islamic and Western scholarship, offering several concentrations, including Islamic law.[125] Educational institutions in the United States exist and can provide training for an indigenous class of arbiters in Islamic law and

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The Case of the Shari'a in Israel, 46 DIE WELT DES ISLAMS 168, 170 (2006).

117. Benhalim, *Religious Courts*, *supra* note 3, at 752 (noting that recourse via legislative action is complicated due to political and religious identity). The Sharia courts have carried out a series of reforms via the Sharia Court of Appeals, which has led to an improvement of women's status with relation to divorce. *Id.* The Justices look to Islamic law for inspiration and derive their rulings from a variety of sources, such as the laws of regional Muslim majority countries like Egypt and Jordan. *Id.*

118. *Id.*

119. These include the *Majalla* (1876), the *Ottoman Law of Family Rights* (OLFR) (1917), and the *Law of Procedure for Sharia Courts* (1917).

120. *See* Jacob M. Landau*, Changing Patterns of Community Structures, with Special Reference to Ottoman Egypt*, *in* JEWS, TURKS, OTTOMANS: A SHARED HISTORY, FIFTEENTH THROUGH THE TWENTIETH CENTURY 77, 86 (Avigdor Levy ed., 1st ed. 2002). These legislations succeed the Tanzimat Reforms in the early 1840s, which included the secularization of governmental and legal structures, the codification of law, and the creation of secular, civil courts that functioned parallel to the Sharia courts. *Id.*

121. *Id.*

122. *See* Moussa Abou Ramadan, *Divorce Reform in the Shari'a Court of Appeals in Israel (1992–2003)*, 13 ISLAMIC L. & SOC'Y 242 (2006).

123. *See* Moussa Abou Ramadan, *Islamic Legal Reform: Shari'a Court of Appeals and Maintenance for Muslim Wives in Israel*, 4 HAWWA 29 (2006). The Sharia courts have only engaged in the process of reforming their understanding of Islamic Law for the past two decades. *Id.* They have introduced reforms in the fields of maintenance, child custody, inheritance, and procedure and have also adopted facets of Israeli legislation, such as the principle of judging in the interest of the child. *Id.* at 30–31.

124. *See Bachelor Degree Curriculum*, ZAYTUNA COLL., https://zaytuna.edu/ba-year-1 [https://perma.cc/JEW9-2MCP] (last visited Apr. 2, 2024).

125. *Master's Degree in Islamic Texts*, ZAYTUNA COLL., https://zaytuna.edu/masters-degree [https://perma.cc/K5GD-NHJX] (last visited Apr. 2, 2024).

leadership on top of the hundreds of accredited U.S. law schools.[126] One such institution, the Islamic Seminary of America, has created joint partnerships with Southern Methodist University (SMU) and Yale Divinity School to offer continuing courses in Islamic Studies and training for American Muslim chaplains and Imams.[127] These programs can be utilized for lawyers wishing to become future MAT arbiters.

Second, there have been calls for a MAT in the past. In 1998, the Council of Masajid of the United States issued a resolution to establish a national network of Islamic arbitration councils in thirty cities and towns nationwide to deal specifically with family law issues.[128] Likewise, in 2001, Professor Sherman Jackson stated at a conference at Harvard University that "the need for it is urgent especially in family law, and that the advantages outweigh its drawbacks."[129] The issue resurfaced yet again in the 2008 Assembly of Muslim Jurists of America (AMJA) annual conference,[130] which concentrated specifically on how to establish a system of Muslim dispute resolution in the United States that would not only be rooted in traditional Islamic jurisprudence but also harmonize with U.S. law and public policy. Currently, versions of Muslim ADR exist, such as the 84% of masjids providing marital counseling[131] and the Texas Islamic Court.[132] However, these attempts at "an Islamic ADR are often ad hoc, with little consistency or coordination between organizations and individuals offering such services."[133]

Finally, while other countries, both minority- and majority-Muslim, have

126. *See Master in Islamic Religious Leadership*, BOS. ISLAMIC SEMINARY, https://www.bostonislamicseminary.org/mirl-overview/ [https://perma.cc/9RVZ-6VCC] (last visited Apr. 2, 2024); *About Bayan*, BAYAN, https://www.bayanonline.org/about [https://perma.cc/S55E-SGH6] (last visited Apr. 2, 2024); *Islamic Chaplaincy Pathway*, HARTFORD INT'L UNIV. RELIGION & PEACE, https://www.hartfordinternational.edu/interreligious-peace-studies-programs/degree-programs/ma-chaplaincy/islamic-chaplaincy-pathway [https://perma.cc/97V9-MJLR] (last visited Apr. 2, 2024); BAYYINAH, https://bayyinah.com/ [https://perma.cc/DSQ9-AE4L] (last visited Apr. 2, 2024). This list does not take into consideration the numerous accredited law schools that include courses in Islamic Law and Islamic Finance, such as Harvard Law School, University of California, Los Angeles School of Law, Indiana University Maurer School of Law, University of Michigan Law School, Georgetown University Law Center, University of Colorado Law School, University of California, Irvine School of Law, and so many more.

127. *Member Conferences*, ASS'N OF MUSLIM CHAPLAINS, https://www.associationofmuslimchaplains.org/conference [https://perma.cc/8BUQ-Q2GU] (last visited Apr. 2, 2024) (listing of a conference program, the eighth annual national Shura and in-service training for chaplains and imams and other service providers to the Muslim community).

128. Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 79 (2002).

129. Benhalim, *The Case*, *supra* note 3, at 550 (citing Sherman A. Jackson, Panelist at the Harvard University conference Islam in America: Domestic Challenges, International Concerns and Historical Legacies (Mar. 9–11, 2001); Potential drawbacks discussed *infra* Part II.C.

130. Benhalim, *The Case*, *supra* note 3, at 550.

131. IHSAN BAGBY, THE AMERICAN MOSQUE 2011: ACTIVITIES, ADMINISTRATION AND VITALITY OF THE AMERICAN MOSQUE 10, 14 (2012).

132. *See* Jabri, 108 S.W.3d at 408.

133. Benhalim, *The Case*, *supra* note 3, at 551 (quoting Lee Ann Bambach Faith-Based Arbitration by Muslims in an American Context, 212 (2014) (unpublished Ph.D. dissertation, Emory University) (on file with author) ("That Ye Judge with Justice").

created Muslim arbitration tribunals, the United States may be better positioned to do so than most other countries, including the U.K. This is mainly due to the unique demographic of Muslims in the United States, as the U.S. Muslim population is more diverse than the U.K.'s, with no single country accounting for more than 15% of adult Muslim immigrants to the United States.[134] This community has also seen huge levels of conversion to Islam among Americans, and they are better educated, better integrated, and more diverse than their British counterparts.[135] Because of significantly greater diversity in the ethnic heritage of Muslims in the United States, where there is a much broader diversity of interpretations of religious law than in the United Kingdom, the United States is potentially a better forum for a MAT than the U.K.[136] Finally, surveys indicate that American Muslims strongly associate with their American identity.[137] American Muslim communities are well-positioned to develop an indigenous legal culture that responds to the community's needs rather than being dictated by the legal standards of foreign countries. When courts allow Muslims the space to develop a legal standard consistent with the Islamic legal tradition and the American-style rule of law, such an indigenous legal culture would also guard against the very thing that critics of importing foreign law fear.

Opening a MAT can lead to several potential benefits for the courts and the American Muslim community. Arbitration bodies relieve pressure from state and federal courts in the specific sector of law that they manage. Civil courts will no longer be the only body that deals with cases pertaining to a citizen's use of Islamic law and may one day be the unpopular forum with a growing popularity of the tribunal. Furthermore, the Muslim community will have a forum that provides a more nuanced route to address specific religious concerns that the courts are not equipped to partake in. These arbiters can cite specific sources of Islamic law and defer to several contemporary scholars who would be able to aid the tribunal for complex cases.

Moreover, while impersonal mediation bodies in mosques or under religious legal scholars help Muslim parties on several issues, an arbitration tribunal can provide attorneys trained in American jurisprudence and the foundations of Islamic law to issue binding arbitration rulings and awards that the state and federal courts

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134. *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream*, PEW RSCH. CTR., (July 26, 2017), https://www.pewresearch.org/religion/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/ [https://perma.cc/F6VE-XKNL]. For Muslims in the United States, a plurality (41%) are white, a category that includes those who describe their race as Arab, Middle Eastern, Persian/Iranian or a variety of other ways. *Id.* About three-in-ten are Asian (28%), including those from South Asia, and one-fifth are black (20%). *Id.* Fewer are Hispanic (8%), and an additional 3% identify with another race or with multiple races. *Id.* Contrast that with the U.K. where "74% of Muslims are from an Asian ethnic background (Pakistani—43%, Bangladeshi—16%, Indian— 8%, Other Asian 6%)." Tufyal Choudhury & Helen Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities*, 72 EQUAL. & HUM. RTS. COMM'N RSCH. REP. 7 (2011).

135. Ewen MacAskill, *U.S. Muslims More Assimilated than British*, GUARDIAN (May 23, 2007, 6:54 PM), https://www.theguardian.com/world/2007/may/23/usa.midterms2006 [https://perma.cc/BE7J-KSEQ].

136. Layish, *supra* note 116.

137. *See generally* PEW RSCH. CTR., *supra* note 134.

recognize. This tribunal can provide the religious community with increased transparency and engagement with the larger legal system, for many Muslims would likely not engage with the civil courts at all when an issue about religious law arises.

Finally, a tribunal ensures a commitment to a type of multiculturalism that allows a minority community, such as American Muslims, to retain authority over the "interpretation, application, and enforcement of communal rules within their membership."[138] Such autonomy expands the scope of liberty enjoyed by the community, which enhances freedom by "embedding shared values and interests into a series of rules and obligations[,] [a]nd by building institutions to govern and maintain these rules, [they] create communities that promote the core values shared by their membership."[139] This new interpretation of multiculturalism will help the religious community, but it does represent a serious challenge to the civil courts as they seek to share law-making authority within the state. As such, specific guardrails and procedures can meet the challenge of incorporating a tribunal within the secular state that it is housed in.

C. Addressing Fears Surrounding the Implementation of a MAT

The benefits of a MAT must be balanced with the potential drawbacks. The goal of a Muslim arbitration tribunal is to support Islamic legal tradition without hindering an individual's protected rights. MATs, for example, must promote modern standard notions of gender equality in both procedure and substance, or secular courts will not uphold any arbitration agreement or enforce an arbitration award in which a private party waives rights intended to protect the public generally.[140] Currently, there are a number of protections guaranteed by existing legislation to ensure fairness and integrity: FAA's sections 10 and 11 empower the federal courts to set aside an arbitration award for several circumstances[141] or to make "an order modifying or correcting the award . . . so as to . . . promote justice between the parties."[142] However, these protections serve as a floor.

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138. Helfand, *supra* note **Error! Bookmark not defined.**, at 1235.

139. *Id.* at 1275.

140. *See* U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, ¶ 2(b), June 10, 1958, 211 U.S.T. 2520. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." *Id. See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (holding that courts may refuse to enforce an arbitration agreement or award that would violate a well-defined and established public policy).

141. *See* 9 U.S.C. § 10. Specific circumstances include (1) "where the award was procured by corruption, fraud, or undue means" and (2) "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." *Id.*

142. 9 U.S.C. § 11. Circumstances include (a) "Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;" (b) "Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted;" and (c) "Where the award is imperfect in matter of form not affecting the merits of the controversy." *Id.*

Therefore, this section introduces suggestions for the procedures that a MAT should have to ensure that it can avoid any issues deemed unconscionable to the American public, the civil courts, and the Muslim community relying on such a tribunal.

Several measures can be implemented to protect an individual's liberties while maintaining the tribunal's jurisdiction over substantive Islamic law. The first is for the parties' right to appeal an arbiter's decision or arbitration awards.[143] Courts have the authority to void any awards violating public policy to protect third-party interests.[144] One way to avoid an agreement being voided is to adopt a balancing approach to public policy, elevating unique first-party interests in favor of enforcing agreements even when doing so threatens important third-party interests, as seen in the international arbitration context.[145] The mere fact that an arbitration provision in a contract stands in tension with public policy should not be enough to invalidate the provision. Rather, courts look to whether general public policy in favor of enforcing the provision is more important than the concerns of the particular case, enhancing party autonomy by providing room to argue the consequences of nonenforcement of the clause.

Another reform suggestion brought by Professor Helfand is to establish an unconscionability standard for addressing any procedural or substantive law that would be grossly unfair.[146] Religious arbitration courts often provide litigants with more protections than standard arbitral fora.[147] Still, they can also apply grossly unfair laws, such as rules precluding women's testimony in some religious legal contexts.[148] "Most courts require parties to demonstrate both 'procedural unconscionability' and 'substantive unconscionability'" to successfully advance a claim of unconscionability.[149] Procedural unconscionability pertains to "the process

143. *See* S.B. 62, 2011 Leg., Reg. Sess. (Ala. 2011) ("Specifically, the courts shall not consider international law or Sharia."); *see also* H.R.J. Res. 1004, 2011 Leg., 86th Sess. (S.D. 2011) ("No . . . court may apply . . . any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction."); S.J. Res. 1387, 2010 Gen. Assemb., 118th Sess. (S.C. 2010) ("Specifically, the courts shall not consider Sharia Law . . . ."). It is for this reason that various state legislatures have proposed bills reiterating that arbitration awards based on alternative legal systems, specifically religious legal systems, are void.

144. *E.g.* Simcha Krauss, *Hasagath Gvul*, 29 J. HALACHA & CONTEMP. SOC'Y 5, 8–10 (1995). The Jewish law principle of Hasagath Gvul prohibits certain types of unduly competitive business practices that could lead to financial ruin for an already established business a summary of this principle was found in. *Id.* This has been seen to conflict with state and federal antitrust statutes and as an affront to public policy. *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("[T]he United States have a strong public policy interest in enforcing antitrust statutes.").

145. *See* Roby v. Corp. of Lloyd's, 996 F.2d 1353 (2d Cir. 1993) (requiring a party to submit claims made under U.S. federal statutes to arbitration in England or to English courts in compliance with previously agreed-upon arbitration clauses and choice-of-law clauses). The case balanced the importance of enforcing international business agreements against the plaintiffs' concerns that such agreements violated the antiwaiver provisions of the 1934 Securities Act. *Id.*

146. *See* Helfand, *supra* note **Error! Bookmark not defined.**, at 1294–1303.

147. *Id.* at 1294.

148. *Id.* (citing Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE EAST STUD. 185 (1997)).

149. *Id.* at 1296.

by which [parties reach] an agreement . . . and the form of the agreement, including the use therein of fine print and convoluted language or unclear language."[150]

Substantive unconscionability refers to "contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not [agree to]."[151] Examples of such terms include clauses that limit liability or require arbitration in a distant location.[152] Given that there are sometimes pressures within religious communities to decide whether to bring a claim in a religious arbitration court, the unconscionability doctrine may serve as an important check on the fairness of religious arbitration awards.

Further procedures can ensure transparency between the parties, who in turn may determine if their arbiter reached their decision fairly. Steps include maintaining records in English or other languages to ensure they are understandable to all parties involved, providing copies of the agreement to each party, ensuring that any arbitration clause specifies how the arbitrator will manage the proceedings, explicitly giving the parties room to modify the agreement, allowing parties access to procedural rules of the tribunal and the arbiters' background and education, and including explanations of the arbitrators' decision.[153] When including the current protections provided by the FAA, a public policy balancing test utilized by International commercial arbitration bodies, and an unconscionability standard, these guardrails can meet the challenge of creating a MAT that ensures that civil courts will not vacate arbitral agreements and awards and can promote the values of fairness and equality.

CONCLUSION

Continued research beyond this Note can illuminate what type of substantive law a MAT can provide for the Muslim community. It can also answer questions, such as how the tribunal would interact with states that have introduced Anti-Sharia bills that were previously mentioned, whether the MAT be created at the state or federal level, whether a MAT would deal with both Muslim and non-Muslim parties, and whether religious arbitration can withstand potential violations to the Free Exercise and Establishment clause. Finally, more work can be done to see how a MAT could create a new *fiqh* for minorities, reflecting the desires of the Muslim community in the United States. For now, however, the current landscape in the United States calls for the creation of a MAT to address the failures of addressing Islamic law in civil courts. Judicial and political failures prevent courts from adequately addressing cases that utilize Islamic law, and the proposed reforms

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150. Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999).

151. *Id.*

152. *See* OTO, L.L.C. v. Kho, 8 Cal. 5th 111 (Cal. S.C. 2019) (holding an arbitration agreement substantively unconscionable because it required arbitration in a distant location away from the employee's home, imposing significant hardship without justification).

153. *See* Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108 (2010).

brought by the scholars above, which attempt to fix judicial inadequacies, do not address the root of the problem. Islamic arbitration is possible and practiced in several countries. These RDRs continue to adhere to their respective secular courts. Moreover, the United States is uniquely positioned to successfully provide for such a tribunal alongside the several benefits that can come out of it. Finally, a MAT can issue judgments and awards while promoting fairness, equality, and justice when working under parameters such as a public policy balancing test and the unconscionability doctrine. Not only is establishing a MAT possible but it is necessary.